

Service Date: December 22, 1999

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Joint Application of)	
Qwest Communications Corporation, <u>et al.</u> , and)	UTILITY DIVISION
U S WEST Communications, Inc., <u>et al.</u> , for)		
Approval of the Merger of Parent Corporations,)	DOCKET NO. D99.8.200
U S WEST, Inc. and Qwest Communications)	
International Inc.)	ORDER NO. 6199c

ORDER ON RECONSIDERATION

BACKGROUND

1. At the request of Quest Inc. and U S WEST Communications, Inc. (Applicants) the Montana Public Service Commission (Commission) issued a Protective Order in this Docket, Order No. 6199a, on November 17, 1999, separately providing protection for two kinds of information. "Proprietary Information" would be given to Commission Staff and Intervenors under the customary Protective Order requirements; and "Competitive Information" would be provided to Commission Staff and Montana Consumer Counsel Staff and experts (MCC) only, under special protection provided in the Protective Order.

2. On November 24, 1999, Intervenor AT&T Communications of the Mountain States, Inc. (AT&T) filed a Motion for Reconsideration of Order No. 6199a (Protective Order). On November 29, 1999, Intervenor McLeodUSA Telecommunications Services, Inc. (McLeod) filed its Motion for Reconsideration of Order No. 6199a. Intervenors challenged the portions of the Protective Order which specially protected Competitive Information, allowing only the Commission and MCC to have access under very limited conditions. Intervenors maintained that by not having access to this information, they were denied their due process rights and an opportunity to fully participate in the proceeding, in contravention of the United States Constitution and the Montana Supreme Court.

3. Intervenors, including MCC, had also filed various Motions to Compel the filing of complete discovery responses. At a work session on November 30, 1999, the Commission suspended the Procedural Schedule in Procedural Order, Order No. 6199, ¶ 2, and vacated the hearing date of January 26, 2000. The Commission directed Applicants to file briefs in response to the pending motions and brief of AT&T, as well as the motions of McLeod and MCC by December 8, 1999, with reply briefs due from the Intervenors on December 13, 1999.

4. Applicants filed their Joint Opposition to AT&T's and McLeodUSA's Motions for Reconsideration of the Commission's Protective Order on December 8, 1999.

5. On December 10, 1999, McLeod filed its Reply to Applicants' Opposition to Motion for Reconsideration of Protective Order. MCC filed its Reply on December 13, 1999, to Applicants' December 8 filing, with further support of its Motion to Compel, including the information requested in the Hart-Scott-Rodino filing at the Federal Communications Commission (FCC).

6. At its work session on December 14, 1999, the Commission granted the outstanding Motions to Compel in general, and in particular overruled the Applicants' objections to MCC's requests that were based on the Hart-Scott-Rodino Act. The Commission directed Applicants to file complete discovery responses on or before January 3, 2000 to the outstanding discovery, other than the Competitive Information data responses protected under the Protective Order. The Commission directed Applicants to file a non-confidential summary of the Competitive Information and a statement by December 20, 1999, detailing what other states in the western region are doing to protect this information. The Commission deferred action on the Motions for Reconsideration of the Protective Order.

7. On December 15, 1999, the Commission issued its Order Compelling Discovery and Summary, Order No. 6199b.

8. Applicants filed their Joint Statement Regarding Terms and Conditions of Other State Regulatory Commissions' Protective Procedures on December 17, 1999. On December 20, 1999, Applicants filed two documents, Joint Statement Regarding Summary of Competitive Information and Joint Proposal Regarding Terms and Conditions of the Montana Public Service Commission's Protective Order Procedures. In the Proposal, Applicants suggested allowing the competing Intervenors to have access to the Competitive Information, other than the Hart-Scott-

Rodino Act Information requested by the MCC, under terms and conditions adopted by the Washington Utility and Transportation Commission (WUTC). Applicants proposed making the Hart-Scott-Rodino filing available at the local U S WEST offices in Helena to MCC and the Commission.

9. At its work session on December 21, 1999, the Commission on reconsideration modified the Protective Order No. 6199a to allow competing Intervenor access to the Competitive Information, other than the Hart-Scott Rodino filing, under restricted conditions. From the Competitive Information available to competing Intervenor, the Commission excepted the specific Hart-Scott-Rodino information requested by MCC, but modified the WUTC provisions for MCC's and the Commission's access. On its own motion, the Commission limited the scope and time-frame of AT&T's discovery in accordance with the limitations on discovery propounded by McLeod, as set forth in the Notice of Commission Action of November 5, 1999.

FINDINGS OF FACT AND DISCUSSION

10. The Commission finds that it is reasonable to reconsider the Protective Order, Order No. 6199a, and allow AT&T and McLeod sufficient access to the Competitive Information to exercise their rights to due process and access to documents in the case, so that they can meaningfully participate in the Docket. This access must be balanced by the property rights and rights to privacy accruing to the Applicants under the state and federal constitutions.

11. The Montana Supreme Court recognized that citizens have a right to examine documents and observe the deliberations of public bodies under the right to know provisions of the state constitution. Corporations have the right to privacy and the right to protect their property, including trade secret and confidential information of considerable economic value, if the corporations could be irreparably harmed by wide public disclosure. The Court established the framework and protective order requirements to protect trade secret and confidential information. The Court stated that the Protective Order would allow the Commission and the MCC to perform their statutory and/or constitutional duties and allow participants in a case before the Commission to have access to the confidential information to participate in the proceeding, while protecting the confidentiality of the information. The Mountain States Telephone and Telegraph Company, et al., v. the Department of Public Service Regulation, 194

Mont. 277, 634 P.2d 181 (1981).

12. The Commission finds that denying all access to Competitive Information in Order No. 6199a was not consistent with the Mountain States protective order requirements. However, the Commission is also mindful of the potential for leaks of extremely sensitive information that could result from unfettered disclosure to numerous persons ostensibly qualified to have access under routine protective order requirements. Balancing these concerns, the Commission finds it reasonable to allow access to competing intervenors, while providing for the protection of the most sensitive information as requested by Applicants in accordance with the provisions of the WUTC protection, with modifications. In Washington, one outside counsel and one outside expert have access to the highly sensitive information, after signing an agreement not to work for any of Applicants' competitors in a position requiring decision-making for a period of five years. The Commission now reconsiders Order No. 6199a and adopts this procedure for the competing Intervenor for access to the Competitive Information.

13. The only information excepted from access by the competing Intervenor is that information MCC requested pertaining to the Hart-Scott-Rodino Act. Applicants agreed to provide this information to MCC and the Commission staff, but requested that they review this information in the offices of U S WEST where they would be permitted to take notes necessary to assess Applicants' merger as provided under Montana law. The Commission finds it reasonable to allow only the MCC and the Commission staff the access to this particularly limited information.

14. In Mountain States, the Court held that the Commission had the discretion to determine whether or not to release the information in the exercise of its duties, so this decision to limit the release of this information to only the MCC and Commission accords with the Court's holding. However, under Mountain States, the Court also held that the MCC and the Commission have the right to hold confidential information that is subject to a protective order in their office files. (Id., at 194 Mont. 277.) The Commission modifies Applicants' Proposal and directs them to provide the Hart-Scott-Rodino information to the Commission's and MCC's offices. The Commission further directs Applicants to make arrangements for MCC's expert witness to have access to the information at another location, as previously agreed by the MCC and Applicants.

15. Finally, in equity and to expedite the proceedings, the Commission finds that the same limitations on scope and time-frame applied to the discovery of McLeod will apply to the discovery propounded by AT&T. At its work sessions on November 2 and 4, 1999, the Commission deferred ruling on AT&T's objections to Applicants discovery responses, pending a later determination of sufficiency of responses. Since that time AT&T filed a Motion to Compel, alleging that the responses had been insufficient. Applicants have indicated their intentions to fully and timely comply with discovery. The Commission finds that the same limitations of time and locale apply to the similar data responses to AT&T's requests, i.e., limited to the requirement to answer for the 14-state region and for a period of two years.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission (Commission) has jurisdiction over the parties in this proceeding pursuant to Title 69, Chapter 3, Montana Code Annotated (MCA). The Commission is invested with full power of supervision, regulation and control of public utilities, as provided in this chapter. § 69-3-102, MCA.

2. In addition to the modes of procedure prescribed in particular cases, the Commission has the power to regulate the mode and manner of all investigations and hearing of public utilities and other parties before it. § 69-3-103, MCA.

3. The Commission has the duty to balance the public's constitutional right to know and to have access to the public documents with the constitutional rights to privacy, equal protection and protection of property rights of parties before the Commission. In 1981, the Montana Supreme Court established the legal requirements for this balancing of constitutional interests by providing the framework for a protective order. The Supreme Court stated that this protective order would allow the Commission and the MCC to perform their statutory and/or constitutional duties and would allow parties with an interest in the proceedings to have access to confidential information. The Mountain States Telephone and Telegraph Company, et al., v. the Department of Public Service Regulation, 194 Mont. 277, 634 P.2d 181 (1981).

ORDER

WHEREFORE, on Reconsideration of Order No. 6199a, the Commission orders the following:

1. McLeod and AT&T shall have access to Competitive Information, respectively for

each limited to one outside counsel and one outside expert, after each counsel and/or expert signs an agreement not to work for a period of five years for any of Applicants' competitors in a position requiring decision-making. McLeod and AT&T shall not have access to the very limited information of the Hart-Scott-Rodino filing provided to MCC and the Commission.

2. Applicants shall provide the highly sensitive information, denominated the Hart-Scott-Rodino filing, to the offices of MCC and the Commission, where it will be properly protected as required by Mountain States.

3. In compliance with the Order Compelling Discovery and Summary, Order No. 6199b, issued on December 15, 1999, Applicants must file completed discovery by January 3, 2000. The Commission limits the obligation of Applicants to respond to the discovery of AT&T in accordance with the limitations placed on the discovery responses to the requests of McLeod. The same limitations of time and locale apply to the similar data responses to AT&T's requests, i.e., limited to the requirement to answer for the 14-state region and for a period of two years.

4. For that very limited information provided to the Commission and MCC (Hart-Scott-Rodino filing), the provision remains that allows only the MCC and the Commission to challenge the Competitive Information provisions for confidentiality. However, on notice to the Commission and Intervenor, Applicants may release parts of this filing to the present Competitive Information status (one outside counsel and one outside expert for competing Intervenor), if deemed appropriate and/or available outside the Hart-Scott-Rodino filing.

5. All other provisions of the Protective Order, Order No. 6199a, remain in full force and effect.

DONE AND DATED this 21st day of December, 1999, by a vote of 5-0.
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)